

**CITY ATTORNEY'S MEMORANDUM
REGARDING HOME OCCUPATIONS
IN RESIDENTIAL DISTRICTS
Dated October 4, 2010**

At the Common Council's meeting of September 27, 2010, a communication was received signed by nine (9) residents relating to home occupations. The purpose of this memorandum is to address the questions in that communication, correct certain misconceptions, and advise the Council as to the City's enforcement of an ordinance it has already duly enacted.

Prior to addressing the questions, it is necessary to address the use of the term "grandfather" in the citizen communication. The term "grandfathered" is a colloquialism for legal non-conforming status. If there are any home occupations existent in a residential district, prior to the adoption of any code provisions that govern use of a property in that district, that use would be grandfathered, or deemed a legal non-conforming use (if not discontinued for a twelve (12) month period). I do not know of any such grandfathered businesses still existent in any residential district which have been the subject of a citizen complaint in the last ten (10) to twenty (20) years. I suspect that the use of the term "grandfathered" refers to home occupations that have simply existed for a lengthy period of time. Those businesses, and we have only recently had complaints of one, would likely not be legal non-conforming, but rather legally in conformance with our current home occupation ordinance.

The home occupation ordinance is attached to this memorandum for your reference. I would recommend that it be read at this point, so that you have the benefit of refreshing your recollection as to the provisions of the ordinance before I address the questions.

QUESTIONS:

Why are there any businesses (not under the grandfather provision) allowed in residential areas? This specifically refers to businesses with clients coming to premises.

As indicated above, I do not know of any complaints regarding an actual legal non-conforming home occupation. The business referred to in all likelihood in this question is one of which staff is aware, and as to which staff reached an agreement with the owner that clients visiting the premises would not be violative of the ordinance. Absent any new information to the contrary, staff is unaware of any businesses in a residential area which service clients in violation of the ordinance.

Why is there no enforceable definition of home businesses?

It is my opinion that the parameters regarding a home occupation as set forth in the ordinance does provide an adequate definition, and enforceable standards.

Why are these businesses being allowed based on popularity contests?

This question probably does not require an answer, but there is no business that has been allowed based upon the popularity of the property owner or business operator.

Why are City employees counseling citizens on how to get around laws (i.e. parking spaces and back entrances)?

City employees counsel citizens on how to comply with ordinances, not how to get around them.

Why are inconsistency and subjectivity part of this situation?

While there is an element of subjectivity in this ordinance, as with many laws, staff believes it has enforced this ordinance consistently, and by applying the standards on a reasonable basis. For example, what constitutes unusual traffic, one of the standards in the ordinance, requires review, interpretation, and application. Staff interprets and enforces this type of language under what is often referred to in the law as a “reasonable man” standard. In other words, looking at a particular location, the nature of the neighborhood, the nature of the street upon which the property is situated, the amount of traffic that generally exists regardless of the business, will the home occupation alter traffic in a manner problematic to a hypothetically reasonable person. This is a far better approach than a ridged formula. For example, a “three (3) cars per day” standard would literally double the traffic on a street that only experienced three (3) cars per day. But three (3) cars would be imperceptible on a street that experiences one hundred and twenty (120) cars per day.

Why can't the City Council define the current ordinance which was recently amended by the common council?

The City Council does not define its ordinances. It reviews the language, considers the enforceability and the sufficiency of its specifics, and then determines whether or not to adopt an ordinance. Ordinances can be void due to being so impermissibly vague that they defy enforcement under a reasonable man standard. In my opinion this ordinance does not fail, but rather has worked rather well for a considerable period of time. A recent experience with one operator caused staff to bring to the Council an additional limitation or standard, that being the hours restrictions which are now in the ordinance as recently adopted by the Council.

Why are City employees regulating ordinance without clearly defined parameters?

See my previous response.

This type of drafting has support in Supreme Court decisions. What the citizens perceive as vagueness, is in my opinion, an effort to “envision the countless permutation of facts that might arise in the universe of future cases.” That objective, recognized by the Supreme Court itself, has been achieved by the ordinance as adopted.